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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JWB

DEPUTY

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15 Attorneys for Plaintiff

16
17 IN THE UNITED STATES DISTRICT COURT
18 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

19 CHIQUITA FRESH, N.A., L.L.C.
 20 250 East Fifth Street
 21 Cincinnati, Ohio 45202
 22 (513) 784-8000

23 Plaintiff

24 v.

25 SAMMY'S PRODUCE, INC.
 26 1635 Rosencrans Street, Suite D
 27 San Diego, California 92106
 28 (760) 631-4250

and

29 YAN SKWARA
 30 1635 Rosencrans Street, Suite D
 31 San Diego, California 92106
 32 (760) 631-4250

and

33 SAMUEL V. NUCCI
 34 1635 Rosencrans Street, Suite D
 35 San Diego, California 92106
 36 (760) 631-4250

and

37 Chiquita Fresh v. Sammy's Produce, et al.
 38 Complaint (To Enforce Payment from Produce Trust)

'08 CV 714 JLS (PDR)

Civil Action No: _____

**COMPLAINT
(To Enforce Payment
From Produce Trust)**

Page 1

ORIGINAL

1 DARIN PINES
2 1635 Rosencrans Street, Suite D
3 San Diego, California 92106
4 (760) 631-4250

Defendants

5 Chiquita Fresh, N.A., L.L.C. ("plaintiff"), for its complaint against defendants
6 alleges:

7 JURISDICTION AND VENUE

8 1. Jurisdiction is based on Section 5(c)(5) of the Perishable Agricultural
9 Commodities Act, 7 U.S.C. §499e(c)(5) (hereafter "the PACA") and 28 U.S.C. §1331.

10 2. Venue in this District is based on 28 U.S.C. §1391 in that (a) plaintiff's
11 claim arose in this District and (b) defendants' principal place of business is in this
12 District.

13 PARTIES

14 3. Plaintiff, an Ohio limited liability corporation with its principal place of
15 business in Cincinnati, Ohio, is engaged in the business of buying and selling wholesale
16 quantities of perishable agricultural commodities (hereafter "produce") in interstate
17 commerce and was at all times pertinent herein, a dealer subject to and licensed under
18 the provisions of the PACA as a dealer.

19 4. a. Defendant, Sammy's Produce, Inc. ("Sammy's Produce"), a
20 California corporation with its principal place of business in Vista, California, is engaged
21 in the business of buying wholesale quantities of produce in interstate commerce and
22 was at all times pertinent herein, a dealer subject to and licensed under the provisions of
23 the PACA as a dealer.

24 b. Defendants Yan Skwara, Samuel V. Nucci and Darin Pines are and
25 were the officers and directors of Sammy's Produce, during the period of time in question
26 who controlled the day to day operations of Sammy's Produce and were in positions of
27 control over the PACA trust assets belonging to plaintiff.

GENERAL ALLEGATIONS

5. This action is brought to enforce the trust provisions of P.L. 98-273, the 1984 amendment to Section 5(c) of the PACA, 7 U.S.C. §499e(c).

6. Between February 14, 2008 and March 12, 2008, plaintiff sold and delivered to defendants, in interstate commerce, wholesale amounts of produce worth \$73,545.90, which remains unpaid.

7. Defendants accepted the produce from plaintiff.

8. At the time of receipt of the produce, plaintiff became a beneficiary in a statutory trust designed to assure payment to produce suppliers. The trust consists of all produce or produce-related assets, including all funds commingled with funds from other sources and all assets procured by such funds, in the possession or control of defendants since the creation of the trust.

9. Plaintiff preserved its interest in the PACA trust in the amount of \$73,545.90 and remains a beneficiary until full payment is made for the produce.

10. Defendants have not disputed the debt in any way and have repeatedly promised to pay, but have not done so in direct violation of the trust provisions of the PACA.

11. Defendants' failure and refusal to pay plaintiff demonstrate that defendants are failing to maintain sufficient assets in the statutory trust to pay plaintiff and are dissipating trust assets.

Count 1

(Failure to Pay Trust Funds)

12. Plaintiff incorporates each and every allegation set forth in paragraphs 1 to
11 above as if fully set forth herein.

13. The failure of defendants to make payment to plaintiff of trust funds in the amount of \$73,545.90 from the statutory trust is a violation of PACA and PACA regulations, and is unlawful.

1 WHEREFORE, plaintiff requests an order enforcing payment from the trust by
2 requiring immediate payment of \$73,545.90 to plaintiff.

3 Count 2

4 (Failure to Pay For Goods Sold)

5 14. Plaintiff incorporates each and every allegation set forth in paragraphs 1 to
6 13 above as if fully set forth herein.

7 15. Defendants failed and refused to pay plaintiff \$73,545.90 owed to plaintiff
8 for produce and other items received by defendants from plaintiff.

9 WHEREFORE, plaintiff requests judgment in the amount of \$73,545.90 against
10 the defendants, jointly and severally.

11 Count 3

12 (Unlawful Dissipation of Trust Assets by
13 a Corporate Official – Yan Skwara)

14 16. Plaintiff incorporates each and every allegation set forth in paragraph 1 to
15 15 above as if fully set forth herein.

16 17. Defendant, Yan Skwara, was an officer who operated Sammy's Produce
17 during the period of time in question and who was in a position of control over the PACA
18 trust assets belonging to plaintiff.

19 18. Defendant, Yan Skwara, failed to direct the corporation to fulfill its statutory
20 duties to preserve PACA trust assets and pay plaintiff for the produce supplied.

21 19. Defendant, Yan Skwara's failure to direct the corporation to maintain PACA
22 trust assets and pay plaintiff for the produce it supplied was an unlawful dissipation of
23 trust assets by a corporate official.

25 20. As a result of said unlawful dissipation of trust assets, plaintiff has been
26 deprived of its rights as a beneficiary in the produce trust and has been denied payment
27 for the produce it supplied.

1 WHEREFORE, plaintiff requests judgment against defendant Yan Skwara in the
2 amount of \$73,545.90.

3 Count 4

4 (Unlawful Dissipation of Trust Assets by
5 a Corporate Official – Samuel V. Nucci)

6 21. Plaintiff incorporates each and every allegation set forth in paragraph 1 to
7 20 above as if fully set forth herein.

8 22. Defendant, Samuel V. Nucci, was an officer who operated Sammy's
9 Produce during the period of time in question and who was in a position of control over
10 the PACA trust assets belonging to plaintiff.

11 23. Defendant, Samuel V. Nucci, failed to direct the corporation to fulfill its
12 statutory duties to preserve PACA trust assets and pay plaintiff for the produce supplied.

13 24. Defendant, Samuel V. Nucci's failure to direct the corporation to maintain
14 PACA trust assets and pay plaintiff for the produce it supplied was an unlawful
15 dissipation of trust assets by a corporate official.

16 25. As a result of said unlawful dissipation of trust assets, plaintiff has been
17 deprived of its rights as a beneficiary in the produce trust and has been denied payment
18 for the produce it supplied.

19 WHEREFORE, plaintiff requests judgment against defendant Samuel V. Nucci in
20 the amount of \$73,545.90.

22 Count 5

23 (Unlawful Dissipation of Trust Assets by
24 a Corporate Official – Darin Pines)

25 26. Plaintiff incorporates each and every allegation set forth in paragraph 1 to
26 above as if fully set forth herein.

27 27. Defendant, Darin Pines, was an officer who operated Sammy's Produce
28 during the period of time in question and who was in a position of control over the PACA
trust assets belonging to plaintiff.

28. Defendant, Darin Pines, failed to direct the corporation to fulfill its statutory duties to preserve PACA trust assets and pay plaintiff for the produce supplied.

29. Defendant, Darin Pines's failure to direct the corporation to maintain PACA trust assets and pay plaintiff for the produce it supplied was an unlawful dissipation of trust assets by a corporate official.

30. As a result of said unlawful dissipation of trust assets, plaintiff has been deprived of its rights as a beneficiary in the produce trust and has been denied payment for the produce it supplied.

WHEREFORE, plaintiff requests judgment against defendant Darin Pines in the amount of \$73,545.90.

Count 6

(Interest and Attorney's Fees)

31. Plaintiff incorporates each and every allegation set forth in paragraphs 1 to 30 above as if fully set forth herein.

32. Defendants' failed to make full payment promptly of \$73,545.90 and plaintiff has lost the use of said money.

33. As a result of defendants' failure to make full payment promptly of \$73,545.90, plaintiff has been required to pay attorney's fees and costs in order to bring this action to require defendants to comply with their statutory duties.

34. PACA and the invoices of plaintiff entitle plaintiff to recover prejudgment interest at the rate of 18% per annum and attorney's fees incurred to collect any balance due from defendants.

WHEREFORE, plaintiff prays as follows:

1

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111

1 (1) Plaintiff requests judgment against each of the defendants, jointly and
2 severally, for prejudgment interest, costs and attorneys fees.
3

4 (2) Such other relief as the Court deems just and proper.
5
6
7
8

Dated this 17th day of April, 2008

KIRBY & MCGUINN, A P.C.

By:

Dean T. Kirby, Jr., Bar No. 090114
600 B Street, Suite 1950
San Diego, California 92101-4515
(619) 685-4000

McCARRON & DIES

By:

Louis W. Diess, III
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(202) 364-0400
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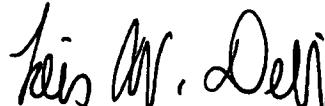
Attorneys for Plaintiff

- 1 (1) Plaintiff requests judgment against each of the defendants, jointly and
2 severally, for prejudgment interest, costs and attorneys fees.
3 (2) Such other relief as the Court deems just and proper.

4
5
6
7
8 Dated this 17th day of April, 2008
9

10 KIRBY & McGUINN, A.P.C.

11 By: _____
12 Dean T. Kirby, Jr., Bar No. 090114
13 600 B Street, Suite 1950
San Diego, California 92101-4515
(619) 685-4000

14 McCARRON & DIESS
15 
16 By: _____
17 Louis W. Diess, III
18 4900 Massachusetts Ave., N.W.
Suite 310
(202) 364-0400
(202) 364-2731 fax
19
20 Attorneys for Plaintiff
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**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

**# 149973 - SH
* * C O P Y * *
April 18, 2008
14:35:35**

Civ Fil Non-Pris
USAO #: 08CV0714
Judge.: JANIS L. SAMMARTINO
Amount.: \$350.00 CK
Check#: BC023520

Total-> \$350.00

FROM: CHIQUITA FRESH V. SAMMY'S PROD

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

CHIQUITA FRESH, N.A., LLC

(b) County of Residence of First Listed Plaintiff Hamilton
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Kirby & McGuinn, 600 B Street, Suite 1950,
San Diego, CA 92101 / 619-685-4000

DEFENDANTS

SAMMY'S PRODUCE, INC., YAN SKWARA,
SAMUEL V. NUCCI AND DARIN PINESCounty of Residence of First Listed Defendant San Diego

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

DEPUTY

Attorneys (If Known)

'08 CV 714

JLS (POR)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- | | |
|--|---|
| <input type="checkbox"/> 1 U.S. Government Plaintiff | <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) |
| <input type="checkbox"/> 2 U.S. Government Defendant | <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III) |

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

| Citizen of This State | PTF | DEF | Citizen of Another State | PTF | DEF |
|----------------------------|----------------------------|---|----------------------------|----------------------------|---|
| <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State |
| <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 | |
| <input type="checkbox"/> 5 | <input type="checkbox"/> 5 | | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 | |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

| CONTRACT | TORTS | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES |
|---|--|---|---|--|
| <input type="checkbox"/> 110 Insurance | PERSONAL INJURY | PERSONAL INJURY | PROPERTY RIGHTS | <input type="checkbox"/> 400 State Reapportionment |
| <input type="checkbox"/> 120 Marine | <input type="checkbox"/> 310 Airplane | <input type="checkbox"/> 362 Personal Injury - Med. Malpractice | <input type="checkbox"/> 422 Appeal 28 USC 158 | <input type="checkbox"/> 410 Antitrust |
| <input type="checkbox"/> 130 Miller Act | <input type="checkbox"/> 315 Airplane Product Liability | <input type="checkbox"/> 365 Personal Injury - Product Liability | <input type="checkbox"/> 423 Withdrawal 28 USC 157 | <input type="checkbox"/> 430 Banks and Banking |
| <input type="checkbox"/> 140 Negotiable Instrument | <input type="checkbox"/> 320 Assault, Libel & Slander | <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability | <input type="checkbox"/> 450 Commerce | <input type="checkbox"/> 440 Deportation |
| <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment | <input type="checkbox"/> 330 Federal Employers' Liability | <input type="checkbox"/> 370 Other Fraud | <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations | <input type="checkbox"/> 480 Consumer Credit |
| <input type="checkbox"/> 151 Medicare Act | <input type="checkbox"/> 340 Marine | <input type="checkbox"/> 371 Truth in Lending | <input type="checkbox"/> 490 Cable/Sat TV | <input type="checkbox"/> 490 Selective Service |
| <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) | <input type="checkbox"/> 345 Marine Product Liability | <input type="checkbox"/> 380 Other Personal Property Damage | <input type="checkbox"/> 510 HIA (1395ff) | <input type="checkbox"/> 850 Securities/Commodities/ Exchange |
| <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits | <input type="checkbox"/> 350 Motor Vehicle | <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 862 Black Lung (923) | <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 |
| <input type="checkbox"/> 160 Stockholders' Suits | <input type="checkbox"/> 355 Motor Vehicle Product Liability | <input type="checkbox"/> 390 Other Personal Injury | <input type="checkbox"/> 863 DIWC/DIWV (405(g)) | <input checked="" type="checkbox"/> 890 Other Statutory Actions |
| <input type="checkbox"/> 190 Other Contract | <input type="checkbox"/> 360 Other Personal Injury | <input type="checkbox"/> 400 Other | <input type="checkbox"/> 864 SSID Title XVI | <input type="checkbox"/> 891 Agricultural Acts |
| <input type="checkbox"/> 195 Contract Product Liability | | | <input type="checkbox"/> 865 RSI (405(g)) | <input type="checkbox"/> 892 Economic Stabilization Act |
| <input type="checkbox"/> 196 Franchise | | | <input type="checkbox"/> 710 Fair Labor Standards Act | <input type="checkbox"/> 893 Environmental Matters |
| REAL PROPERTY | CIVIL RIGHTS | PRISONER PETITIONS | SOCIAL SECURITY | <input type="checkbox"/> 894 Energy Allocation Act |
| <input type="checkbox"/> 210 Land Condemnation | <input type="checkbox"/> 441 Voting | <input type="checkbox"/> 510 Motions to Vacate Sentence | <input type="checkbox"/> 861 HIA (1395ff) | <input type="checkbox"/> 895 Freedom of Information Act |
| <input type="checkbox"/> 220 Foreclosure | <input type="checkbox"/> 442 Employment | Habeas Corpus: | <input type="checkbox"/> 862 Black Lung (923) | <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice |
| <input type="checkbox"/> 230 Rent Lease & Ejectment | <input type="checkbox"/> 443 Housing/ Accommodations | <input type="checkbox"/> 530 General | <input type="checkbox"/> 863 DIWC/DIWV (405(g)) | <input type="checkbox"/> 950 Constitutionality of State Statutes |
| <input type="checkbox"/> 240 Torts to Land | <input type="checkbox"/> 444 Welfare | <input type="checkbox"/> 535 Death Penalty | <input type="checkbox"/> 720 Labor/Mgmt. Relations | |
| <input type="checkbox"/> 245 Tort Product Liability | <input type="checkbox"/> 445 Amer. w/Disabilities - Employment | <input type="checkbox"/> 540 Mandamus & Other | <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act | |
| <input type="checkbox"/> 290 All Other Real Property | <input type="checkbox"/> 446 Amer. w/Disabilities - Other | <input type="checkbox"/> 550 Civil Rights | <input type="checkbox"/> 740 Railway Labor Act | |
| | <input type="checkbox"/> 440 Other Civil Rights | <input type="checkbox"/> 555 Prison Condition | <input type="checkbox"/> 790 Other Labor Litigation | |
| | | | <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act | |
| | | | IMMIGRATION | |
| | | | <input type="checkbox"/> 462 Naturalization Application | |
| | | | <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee | |
| | | | <input type="checkbox"/> 465 Other Immigration Actions | |
| | | | FEDERAL TAX SUITS | |
| | | | <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) | |
| | | | <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609 | |

V. ORIGIN

(Place an "X" in One Box Only)

 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

7 U.S.C. §499e(c)
Brief description of cause:
Failure to make full payment promptly and maintain statutory trust pursuant to 7 U.S.C. §499e(c)

VII. REQUESTED IN COMPLAINT:

 CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

DEMAND \$

73,545.90

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

04/16/2008

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # 149973 AMOUNT \$350

APPLYING IPP

JUDGE

MAG. JUDGE

Se 4/18/08

ORIGINAL